Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA

For The Period
From July 1, 1956
Through September 30, 1956
VOLUME 84

JOHN PATTERSON, Attorney General

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QUARTERLY REPORT

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Volume No. 84

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from July 1, 1956, through September 30, 1956, is published in compliance with the provisiosn of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

JOHN PATTERSON,
Attorney General.

JOHN PATTERSON
Attorney General

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OPINIONS

July 9, 1956

Hon. Perry Prescott
Assistant Director
Department of Conservation
CAPITOL

Conservation, Department of, — Oils — Leases.

The Department of Conservation may place all monies received from oil and gas leases in escrow pending settlement of contested land titles in offshore areas.

Opinion by Special Assistant Attorney General O'Rear.

Dear Sir:

Your request for an official opinion, bearing date of June 25, 1956, is as follows:

"On July 2 and August 3, 1956, the Department of Conservation is accepting sealed bids for oil and gas leases on certain submerged lands lying between three miles offshore and nine miles offshore into the Gulf of Mexico, together with certain other submerged lands. (Copy of invitation for bids and location chart of tracts being offered attached.)

"The United States Department of the Interior, acting by and through its Secretary, recently filed a formal protest with this Department regarding the State's leasing of this area in the Gulf. (Copy of protest attached.)

"Many of the major oil companies have indicated that they would not be interested in bidding on tracts within the disputed area unless all monies from bonuses, rentals and royalties could be placed either in escrow or some trust fund pending final settlement of the ownership of the offshore area.

"In order to stimulate bidding and development in this area, it is necessary that we receive your opinion as to whether or not the State Department of Conservation may legally offer tracts within the disputed area, with all monies received therefrom to be placed either in escrow or trust, pending settlement of the ownership of these lands."

Your attention is directed to Section 4 of Act No. 158, First Special Session 1956, approved February 24, 1956, which Section I quote as follows:

"The Director of Conservation, on behalf of the State, is hereby authorized to lease, upon such terms as he may approve, any lands or any right or

interest therein under any navigable streams or navigable waters, bays, estuaries, lagoons, bayous or lakes, and the shores along any navigable waters to high tide mark, and submerged lands in the Gulf of Mexico within the historic seaward boundary of this State, which is hereby declared to extend seaward six leagues from the land bordering the Gulf, for the exploration, development and production of oil, gas and other minerals, or any one or more of them, on, in and under such lands; and such lands or interests therein for such purposes shall be supervised and managed by the Department of Conservation."

Section 4, supra, shows an obvious legislative intent to clothe the Director of Conservation with full authority to prescribe the conditions and terms under which the State may enter into lease agreements on submerged lands.

Therefore, it is my opinion that the Director of Conservation may, when he deems it to be in the best interest of the State, provide that all monies received from leases on lands located within the disputed tidelands area be placed in escrow pending final adjudication of title to such lands.

Nothing in this opinion should be so construed as to preclude upon the dissolution of an escrow agreement the final deposit of such monies into the General Fund of the State, less a five per cent management fee to the Department of Conservation as cost of administration as provided for by Section 7 of said Act. No. 158.

Yours very truly,

JOHN PATTERSON
Attorney General

July 13, 1956

Honorable W. A. Gayle,
Mayor
City of Montgomery
Montgomery, Alabama

Sunday Laws — Delicatessens — Drugstores.

1. Under Title 14, Section 420, Code of Alabama 1940, as amended by Act. No. 230, General and Local Acts 1953, page 297, delicatessens and drugstores may remain open and sell on Sundays those items customarily and commonly sold in such stores.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 26, 1956, is as follows:

"I would appreciate your official ruling on the definition of the word 'delicatessen' as it is used in 1953 Acts of Alabama, p. 297 (Act No. 230, approved July 24, 1953).

"I will appreciate your answering as fully as possible some of the questions which have arisen in connection with the word 'delicatessen.'

"1. Is it necessary for a person in order to secure the benefits of the 'delicatessen' exemption to meet the health requirements of the laws of Alabama in reference to delicatessen establishments?

"2. I understand that the word 'delicatessen' in general has been defined by the courts to mean prepared foods. Under this definition would such foods be included in delicatessen as Post Toasties, prepared canned Pork and Beans, canned shrimp ready for serving, and numerous other items which are carried in grocery stores, but which are in reality prepared foods.

"3. Delicatessen establishments now carry many things in addition to what was formerly understood to be delicatessen. Can these things be sold?

"4. Can a drug store that is selling other items than drugs sell such items as hardware, glassware, and other items, on Sunday?

"The City, of course, wishes to enforce the law as nearly as possible and we will appreciate all the help that you can give us on what stores can be open on Sundays."

Title 14, Section 420, Code of Alabama 1940, as amended by Act No. 230, General and Local Acts 1953, page 297, reads as follows:

"Any person who compels his child, apprentice, or servant to perform any labor on Sunday, except the customary domestic duties of daily necessity or comfort, or works of charity, or who engages in shooting, hunting, gaming, card playing, or racing on that day, or who, being a merchant or shopkeeper, druggist excepted, keeps open store on Sunday, shall be fined not less than ten nor more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than three months. However, the provisions of this section shall not apply to the operation of railroads, stages, communications, public utilities or steamboats, or other vessels navigating the waters of this State, or to any manufacturing establishment which is required

to be kept in constant operation, or to the sale of gasoline or other motor fuels or motor oils. Nor shall this section prohibit the sale of newspapers, or the operation of newsstands, or Automobile Repair shops, florist shops, fruit stands, ice cream shops or parlors, lunch stands or restuarants, delicatessen or plants engaged in the manufacture or sale of ice, provided such business establishments are not operated in conjunction with some other kind or type of business which is prohibited by this section. It shall also be lawful to engage in motorcycle and automobile racing on Sunday, whether admission is charged or not, except that this proviso shall not be construed to prevent any municipality from passing ordinances prohibiting such racing on Sunday."

From an analysis of the above statute, it can be seen that the statute, among other matters, embraces two phases of operation. The first phase of the statute makes it unlawful, among other things, for a merchant or shopkeeper (druggist excepted) to keep "open store" on Sunday. The second phase of the statute immediately following, insofar as delicatessens are concerned, is to the effect that the statute does not prohibit the operation of delicatessens on Sunday. Thus a delicatessen, as such, does not come within the purview of the statute prohibiting the keeping of "open store."

The question, therefore, resolves itself into one of fact as to what constitutes a delicatessen. Webster's International Dictionary, Second Edition, page 692, defines delicatessen as follows "Prepared foods, such as cooked meats, preserves, relishes, etc.; also, a store where such foods are sold."

It is common knowledge that certain other items, as a common practice through the years, have been sold in delicatessens other than "prepared foods, such as cooked meats, preserves, relishes, etc.," thereby broadening the meaning of a delicatessen store as defined by Webster's International Dectionary. It must be recognized that the Legislature, when it amended this section of the Code in 1953 (Act No. 230, supra, which amendment, among other things, removed delicatessens from the operation of the statute), took into consideration the broadened definition of a delicatessen and did not intend to limit the items sold therein to "prepared foods, such as cooked meats, preserves, relishes, etc."

On the contrary, it must be assumed that the Legislature intended that items customarily and commonly sold in delicatessens in 1953 could be sold in delicatessens on Sunday. The determination of what is and what is not an item customarily and commonly sold in a delicatessen is a question of fact. See **Whitaker v. State,** 17 Ala. App. 625, 88 So. 188.

Your first three questions are, therefore, categorically answered as follows:

In answer to your first question, it is my opinion that it is necessary for a delicatessen to meet the health requirements of the laws of Alabama, whether or not said delicatessen is open on Sunday.

In answer to your second and third questions, as noted from the discussion hereinabove, it is my opinion that a delicatessen may sell on Sunday those items customarily and commonly sold by delicatessens at the time of the 1953 amendment heretofore referred to, and are not restricted solely to the sale of "prepared foods, such as cooked meats, preserves, relishes, etc."

Your fourth question has been answered by the Supreme Court of Alabama in the case of **Lane v. McFadyen**, Chief of Police, 259 Ala. 205, 66 So. 2d 83, in which it was held, in pertinent part, "that a bona fide druggist did not violate the Sunday closing law by keeping open store and selling on Sunday articles of merchandise which had been customarily sold in drug stores for a long period of time." See also **Ex parte Stollenwerck**, 201 Ala. 392, 78 So. 454.

Yours very truly,

JOHN PATTERSON
Attorney General

July 13, 1956

Hon. Ashford Todd
Judge of Probate
Madison County
Courthouse
Huntsville, Alabama

Filing Tax — Deeds — Mortgages.

Even though a prior deed filing tax has been paid on the recordation of an instrument conveying an interest in property. there is no exemption from the deed filing tax on the recordation of a subsequent deed conveying legal title to the same property.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request dated March 28, 1956, addressed to the Department of Revenue, has been forwarded to this office for an official opinion, and is as follows:

"I am enclosing photostat copies of the following instruments:

"Contract between John V. Matthews, Mary Ethel Matthews and Carl B. Thomas.

"Deed from John V. Matthews and wife Mary Ethel Matthews to Carl B. Thomas.

"Mortgage (purchase money) from Carl B. Thomas to Mary Ethel Matthews.

"The above contact was filed for record in this office January 5, 1952 and a deed tax of $105.00 paid.

"Mr. Thomas and Mrs. Matthews are now filing the above deed and purchase money mortgage. Will you please advise me as to the filing tax I should collect on the deed and mortgage?"

It appears from an examination of the recorded contract of sale, as well as the two instruments in question, that upon the recording of such contract, a deed tax was collected based on the entire value of the property involved, even though, at the time of its execution, only $5000 in cash was actually paid, provision being made for the payment of the balance in twenty annual installments. In such cases, there is ample authority to the effect that a deed tax should be collected on the cash consideration which actually changed hands at the time of execution of the contract of sale, and a mortgage tax on the total balance of deferred payments. **Thompson v. Smith,** 234 Ala. 409, 174 So. 797; Quarterly Report of Attorney General, Vol. 28, page 82; Quarterly Report of Attorney General, Vol. 24, page 134.

It is, therefore, obvious that there was error in the amount and application of the tax originally collected, which error was prejudicial to the State but which we feel it is too late at this date to correct.

As to the deed and mortgage now in question, it is my opinion that both a deed and mortgage tax should be collected for the privilege of filing these instruments for record. Title 51, Sections 618 and 619, Code of Alabama 1940, as amended by Acts Nos. 769 and 770, General and Local Acts 1953, pages 1029 and 1031, respectfully.

It should be noted that, in the instant matter, the originally recorded contract of sale conveys only an equitable interest in the property, and not legal title. The deed under consideration is necessary to convey to grantee the fee simple title, and does not fall within any exception contained in Section 618, as amended, supra. Quarterly Report of Attorney General, Vol. 53, page 124; Quarterly Report of Attorney General, Vol. 30, page 45. See also Quarterly Report of Attorney General, Vol. 76, page 39.

In **Hawkins v. Pure Oil Co.,** 232 Ala. 660, 169 So. 307, Judge Gardner, in his concurring opinion, stated:

"Petitioner argues, therefore, that as it already had the legal title, the deed tendered for record was based upon a mere nominal consideration, and for the perfection of its title, within the language of the exception contained in section 21 1/2, which, so far as here pertinent reads: 'Except * * * deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate.'

"If, of course, the deed is for the purpose of acquiring the title, even though on a nominal consideration, the exception would not be applicable, as illustrated in the opinion of the Attorney General referring to a deed executed by an executor to carry out the will of the testator, and by which deed the legal title passes to the devisee. See Biennial Report of Attorney General 1926-28, p. 42.

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"It (Petitioner) has, according to its own contention, the perfect legal title to all of the property of the Wofford Oil Company of every character and description. This title needs no perfection. **The plain purpose of its recordation, therefore, is not for perfection of the title to real estate, as the exception reads, but the perfection of the record of the transaction. But for that privilege the statute exacts a tax, and the exception was not incorporated in the statute for the purpose of enabling one who has the legal title to thus gain the advantage of its recordation without its payment.**" (Emphasis added.)

The conclusion stated above is also supported by opinion of this office reported in Quarterly Report of Attorney General, Volume 58, page 126, holding that, even though a lease of certain property has been recorded and a fliing tax paid, when a second lease between the same parties and describing the same property, plus additional property not described in the first lease, is offered for record, a filing tax is due on the second lease, and this second tax should be based on the total value of the entire property described in the second lease. In so holding, the opinion states, in part, as follows:

"Section 618 and 619, supra, are different in scope and content. The former concerns filing taxes on recordation of deeds, etc; the latter concerns mortgages, etc. Nowhere in Section 618, supra, is there any exemption where a prior deed filing tax has been paid on the recordation of an instrument conveying the same property. But compare Section 619 (d), supra, where mortgages are concerned. And compare further the exemptions actually set out in Section 618, for transfers of mortgages of property upon which a mortgage filing tax has been paid, or for deeds executed for a nominal consideration for the purpose of perfecting title.... Therefore, if the Legislature had intended that the filing of each transfer of a deed or lease should not be subject to a tax, it would be so specified, as it did specify for mortgages."

It might be well to point out that, upon recordation of the original contract of sale, if a mortgage tax had been collected (as it srould properly have been), then there would be good grounds for arguing that no subsequent mortgage tax is now due on the recordation of the purchase money mortgage, under the language of Section 619 (c) and (d), as amended, supra. However, such is not the case here.

Any opinion, or portion thereof, previously rendered by this office, which in any way conflicts with this opinion, is hereby expressly overruled.

Yours very truly,

JOHN PATTERSON
Attorney General

July 19, 1956

Hon. Ralph P. Eagerton
Chief Examiner
Department of Examiners of Public Accounts
State of Alabama
CAPITOL

Accountants and Accounting — Examiner of Accounts — Funds — Governor — Officers and Offices — Statutes.

1. Chief Examiner of the Department of Examiners of Public Accounts has the authority and duty, under Act No. 351, General Acts 1947, page 231, to examine and audit all books, records, vouchers, accounts, supporting papers and documents which would aid said Chief Examiner in an examination and audit of the public records of any State department, bureau, board, commission, corporation, institution, agency, office or officer, including the records of the Executive Department and the office of the Governor.

2. The general fund appropriation to the Office of Governor and the Mansion Fund appropriation are public funds. Such funds must be spent in conformity with the law and for a public purpose, and all books, records, vouchers, accounts, supporting papers and documents pertaining to such funds are subject to examination and audit by the Chief Examiner of the Department of Examiners of Public Accounts.

Opinion by the Attorney General.

Dear Mr. Eagerton:

Your request for an official opinion bearing date of July 5, 1956, is as follows:

"Personnel of this department are currently engaged in routine audit of those records and accounts pertaining to the public funds administered by and through the Office of the Governor. These include the General Fund appropriation to this office and the fund known and designated as the Mansion Fund, this latter fund being created by Act No. 489, Acts 1951, page 871. Departmental action in this regard is being taken pursuant to the provisions of Act No. 351, General Acts 1947, page 231, and the authority there vested in and duty imposed upon this department relative to such audits. Section 1 of Act No. 351, supra, provides that:

" 'The books, records, vouchers, and accounts of every State and county office, officer, bureau, board, commission, corporation, institution, department, and agency shall be examined and audited at least once in every period of two years, and more frequently or continuously if that is deeemed necessary or desirable by the Chief Examiner. * * *'

"Section 8(8) of Act No. 351, supra, further provides that the Chief Examiner shall have the power and duty to 'exercise any other power necessary to expedite the making of thorough and accurate audits of the accounts of all persons receiving or disbursing public funds; * * *.'

"Section 8(9) of Act No. 351, supra, likewise vests in the Chief Examiner the authority and imposes upon him the duty to 'examine and audit the books, accounts, and records of all State and county offices, officers, bureaus, boards, commissions, corporations, departments, and agencies; * * *.'

"In the light of the above this department has heretofore deemed itself vested with the duty and authority to make thorough and accurate audit of the accounts of all persons receiving or disbursing public funds. Acting under such assumption substantial work has been accomplished relative to the audits mentioned above. All work has been completed with reference to the term of the previous Governor covered by this audit and a great portion of the work relating to the term of the present Governor has been accomplished. However, the Examiners performing such audits advise me that in order that they may complete their work it is necessary that they be furnished the supporting invoices for the disbursements made from the Mansion Fund for the period covered by the term of the present chief executive.

"Examiner personnel have made efforts to obtain such ducuments from members of the Governor's staff and under date of June 15 I addressed a registered letter to the Governor advising him of the situation and respectfully requesting of him that the invoices in question be made available for audit. As of this writing such documents have not been made

available but, rather, representatives of the Governor have advised and requested that before any further action be taken relative to these audits your official opinion be obtained as to the rights, duties and prerogatives of this department with respect to such audits. In accordance with such request I do hereby respectfully ask that you advise me by official opinion as to the following:

"(1) Is the Office of the Governor and the holder of such office such a State office, officer, bureau, board, commission, corporation, institution, department or agency as to come within the meaning of Section 1 of Act No. 351, General Acts 1947, supra, which section requires the periodic audit of 'every State and county office, officer,' etc.?

"(2) If your answer to the previous question is in the affirmative, are the books, records, vouchers and accounts of such office or officer, and specifically as they pertain to the operation of the General Fund appropriation to the office and the Mansion Fund operated by such office, subject to periodic audit by this department?

"(3) Are the records and accounts of the Office of the Governor, to include those pertaining to the General Fund appropriation to such office and the Mansion Fund operated by the office, the accounts of a person who receives or disburses public funds within the meaning of Section 8(8) of Act No. 351, supra, which section and subsection vests in the Chief Examiner the power and imposes upon him the duty of 'the making of thorough and accurate audits of the accounts of all persons receiving or disbursing public funds'?

"(4) If your answer to the previous question is in the affirmative should this department in making audit of such accounts examine such records and documents pertaining thereto, to include supporting invoices for disbursements made from the Mansion Fund, as are deemed necessary to the 'making of thorough and accurate audits'?

"In view of the fact that the above audits are currently in progress and are merely being held in abeyance pending your official decision it is requested that you furnish same at your earliest convenience."

Act No. 351, General Acts 1947, page 231, which provides for the auditing periodically of the books, accounts, vouchers, and records of public offices, officers, agencies, and institutions, and creates the Department of Examiners of Public Accounts, is quoted in pertinent part as follows:

"Sec. 1. Periodic examinations and audits. (a) The books, records, vouchers, and accounts of every State and county office, officer, bureau, board, commission, corporation, institution, department, and agency shall be examined and audited at least once in every period of two years, and

more frequently or continuously if that is deemed necessary or desirable by the Chief Examiner. The books, records, vouchers, and accounts of city boards of Education may be examined and audited upon request....

"Sec. 2. Department of Examiners of Public Accounts. (a) There is created a Department of Examiners of Public Accounts, composed of such divisions as the Chief Examiner determines to be necessary . . .

"Sec. 3. Chief Examiner. (a) The department shall be in charge of a Chief Examiner, whose actions shall be supervised and controlled by a Legislative Committee on Public Accounts, . . .

. . . . . .

"Sec. 8. Powers and duties. The Chief Examiner shall be the executive and administrative head of the department and shall have the power and duty to: 1) exercise general supervision of and make regulations for the government of the department; 2) prescribe uniform rules pertaining to investigations, examinations, audits and departmental hearings; . . . 7) invoke any legal, equitable, or special remedy for the enforcement of orders or the provisions of this Act; 8) exercise any other power necessary to expedite the making of thorough and accurate audits of the accounts of all persons receiving or disbursing public funds; 9) examine and audit the books, accounts, and records of all State and county offices, officers, bureaus, boards, commissions, corporations, departments, and agencies; . . ."

The fund in the State Treasury, known as the Mansion Fund, was created by Act No. 489, General and Local Acts 1951, page 871, and is set out in pertinent part as follows:

"Section 1. There is hereby created in the State Treasury a fund to be known as the Mansion Fund. The purpose of said fund shall be to pay for all expenses incident to the operation and maintenance of the official residence of the Chief Executive of the State of Alabama, including all provisions, servants, upkeep and other items, and also all expenses for public or official memorials, entertainment, travel, and other items incident to his office or authorized by him, except that no part of said fund shall be used to pay personal household expenses of the Governor or any of the members of his immediate family.

"Section 2. The money appropriated to said Mansion Fund shall be subject to withdrawal and expenditure upon voucher authorized, approved, and certified by the Governor, upon which the comptroller shall issue his warrant.

"Section 3. The expenditures from said Mansion Fund shall be limited to the amount appropriated thereto by the Legislature and shall be budgeted and allotted pursuant to the provisions of Title 55, Chapter 4, Article 3 of the Code of Alabama of 1940."

It is apparent from an examination of Act No. 351, supra, that the Legislature intended to give the Chief Examiner of the Department of Examiners of Public Accounts full power and authority to examine and audit the books, records, vouchers, and accounts of all State and county offices and officers. The Act gives the Chief Examiner the power to examine said records as frequently as he deems necessary and continuously if he deems it necessary.

The Executive Department and the Office of Governor clearly come within the purview of Section 1 and Section 8, subparagraph 9, of Act No. 351, supra, and the books, records, vouchers and accounts of the Executive Department and the Office of Governor are subject to examination and audit by the Department of Examiners of Public Accounts.

Further, the records and accounts of the Executive Department and the Office of Governor are "the accounts of persons receiving or disbursing public funds" and such accounts clearly come within the provisions of Section 8, subparagraph 8, of Act No. 351, supra.

Section 8, subparagraph 7, of Act No. 351, supra, provides that the Chief Examiner shall invoke any legal, equitable or special remedy for the enforcement of the orders or the provisions of said Act. In reference to the powers of the Chief Examiner under said Section 8, subparagraph 7, of Act No. 351, supra, I would like to refer you to Section 13, Act No. 351, supra, which is set out as follows:

> "Sec. 13. Subpoenas. The Chief Examiner or his specially authorized representative shall have the power to issue subpoenas to compel the attendance of witnesses and production of papers necessary as evidence in connection with a dispute, claim, examination, audit, or the administration of this Act. In case a person refuses to obey such subpoena, the Chief Examiner or his representatives may invoke the aid of any circuit court in order that the testimony or evidence be produced. Upon proper showing, such court shall issue a subpoena or order requiring such person to appear before the Chief Examiner or his representative and produce all evidence and give all testimony relating to the matter in issue. A person failing to obey such order may be punished by the court as for contempt."

You state in your letter that the examiners performing the audit of the books and records of the Mansion Fund have advised that in order to complete their work, it is necessary that they be furnished the supporting invoices for the disbursements from the said Mansion Fund for the period covered by the term of the present Governor. It is my opinion that said supporting invoices are such "books, records, vouchers and accounts," as contemplated by Section 1 and Section 8, subparagraph 9, of Act No. 351, supra, and if you, as Chief Examiner, determine that an examination of such supporting invoices is necessary to complete your audit and examination of the books and accounts of the Executive Department and the Office of Governor, then it is further my opinion that you have the power, authority, and duty to examine such supporting invoices.

When the Legislature created the Mansion Fund by Act No. 489, supra, it was provided that said fund should be paid from the State Treasury, and the amount to be expended from said fund was limited by the amount appropriated by the Legislature in the general appropriation bill. It further provided that said Mansion Fund was to be budgeted and allotted pursuant to the provisions of Title 55, Chapter 4, Article 3, Code of Alabama 1940. It was clearly the intent of the Legislature that the Mansion Fund was to be treated and considered as any other fund created by the Legislature. If the Legislature had intended that the Mansion Fund not be subject to audit by the Department of Examiners of Public Accounts, it certainly would have expressly exempted such fund from audit in Act No. 489, supra.

You should bear in mind that the general fund appropriation to the Office of Governor and the Mansion Fund appropriation are public funds, and such funds must be spent in conformity with the law and for a public purpose.

All books, records, vouchers, accounts, supporting vouchers, and any and all other papers and documents pertaining to the general fund appropriation to the Governor's Office and the Mansion Fund are subject to examination and audit by the Department of Examiners of Public Accounts.

The Chief Examiner not only has the power, but it is his duty, to audit and examine all books, records, vouchers, accounts, supporting vouchers, and all other papers or documents which would aid said Chief Examiner in an examination and audit of the public records of any State department, bureau, board, commission, corporation, institution, agency, office or officer, and this includes the records of the Executive Department and the Office of Governor.

It is, therefore, my opinion that all your questions, numbered 1, 2, 3, and 4, should be answered in the affirmative.

Yours very truly,

JOHN PATTERSON
Attorney General

July 26, 1956

Honorable Clyde White
Sheriff, Autauga County
Prattville, Alabama

Public Safety Department—Highway Patrol—Arrests—Bonds.

If a State Highway Patrol officer makes an arrest for violations of the provisions of Title 36, Code of Alabama 1940, as amended, and approves the bond, the sheriff is not entitled to a fee.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, bearing date of July 16, 1956, is as follows:

"Please advise me whether or not I am entitled to payment of the usual bond fees for arrests by the Highway Patrol made in my County. These bonds are approved by my office and to date, we have received no fees."

Act No. 585, General and Local Acts 1953, page 828, provides, in pertinent part, as follows:

"Section 7. Member of the State Highway Patrol when duly appointed shall have the powers of Peace Officers in this State and may exercise such powers anywhere within the State."

Section 52, Title 36, Code of Alabama 1940, as amended by Act No. 517, General and Local Acts 1949, page 754, provides as follows:

"Section 52. Appearance upon Arrest for Misdemeanor. (a) Whenever any person is arrested for a violation of any provisions of this title punishable as a misdemeanor, the arresting officer shall, unless otherwise provided in this section, take the name and address of such person and the license number of his motor vehicle and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice, and such person shall, if he so desire, have a right to an immediate hearing or a hearing within twenty-four (24) hours at a convenient hour and such hearing to be before a magistrate within the county or city where such offense was committed. Such officer shall thereupon and upon the giving by such person of a sufficient written bond, approved by the arresting officer, to appear at such time and place, forthwith release him from custody.

"'Any person refusing to give such bond to appear shall be taken immediately by the arresting officer before the nearest or most accessible magistrate.

"'Any person who wilfully violates his written bond to appear, given in accordance with this section, shall be guilty of misdemeanor regardless of the disposition of the charge upon which he was originally arrested.

"'(b) The provisions of this section shall not apply to any person arrested and charged with an offense causing or contributing to an accident resulting in injury or death to any person nor to any person charged with driving while under the influence of intoxicating liquor or of narcotic or other drugs nor to any person whom the arresting officer shall have good cause to believe has committed any felony, and the arresting

officer shall take such person forthwith before the nearest or most accessible magistrate.

"'(c) Any officer violating any of the provisions of this section shall be guilty of misconduct in office and shall be subject to removal from office.'"

Inasmuch as an Alabama highway patrolman has the powers of peace officers throughout the State of Alabama, it is my opinion that he would be an "arresting officer" within the purveiw of Act No. 517, supra.

Although you did not specify in your letter the type of arrests, I shall assume, for the purpose of answering this inquiry, that when you use the term "arrests by the Highway Patrol," you mean arrests by the Highway Patrol for violations of Title 36, Code of Alabama 1940, as amended.

Act No. 517, supra, provides that the "arresting officer" **shall** approve the bond of the person arrested for a violation of the provisions of Title 36, as amended, supra, with certain noted exceptions in Section 52, as amended, supra, if said person does not want an immediate hearing. Therefore, where an Alabama highway patrolman is the arresting officer, the patrolman shall approve the bond, unless the arrest is for one of the excepted offenses set out in Section 52, as amended, supra, and no immediate hearing is requested. Quarterly Report of Attorney General, Vol. 49, page 136. Furthermore, said Section 52, does not authorize a fee to be collected by an Alabama highway patrolman for approving said bond. Vol. 49, page 136, supra.

Therefore, if a Highway Patrol officer arrests a person for violating the provisions of Title 36, as amended, supra, except for those offenses for which other treatment is specified, he shall approve the bond of said person or forthwith take said person before a magistrate.

When arrests are made for violations of Title 36, as amended, supra, by you or your deputies and a bond is approved by you or your deputies, you are entitled to the fee prescribed by law, and, of course, you are entitled to your fee for approving bonds as otherwise prescribed by law.

Very truly yours,

JOHN PATTERSON

ATTORNEY GENERAL

August 7, 1956

Hon. L. W. Sanderson, Mayor
Town of Town Creek
Lawrence County
Town Creek, Alabama

Counties—Elections—Municipalities.

1. Changes in voting places in general municipal elections must be made by the county governing body more than three months before the election.

2. The voting places established by virtue of Act No. 655, General Acts 1947, page 504, must be used for general municipal elections.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of July 25, 1956, is as follows:

"Our Town has not been divided into precincts or wards. We have 2 boxes for County, General and Special Elections. Must we have two voting places for Municipal Elections to be held on September 17, 1956. The total vote will not exceed 200. Will you please give us your opinion as soon as possible."

The municipal election to be held on September 17, 1956, to which your request refers, is the general municipal election to be held pursuant to Title 37, Section 404, Code of Alabama 1940, as amended by Act No. 394, General and Local Acts 1955, page 930.

Act No. 655, General Acts 1947, page 504, provides in pertinent part as follows:

"Section 1. For all Federal, State, district, county, or municipal elections hereafter held in this State, whether primary, general or special, places of voting shall be established and designated in accordance with the provisions of this Act and in no other way.

"Section 2. The counties in this State as now divided into election precincts and districts, and incorporated towns and cities as now divided into wards, or districts or voting places and the boundaries of such precincts, districts, and wards as now defined shall so remain until changed as

provided by law; and places of voting as now designated and established shall so remain until changed pursuant to this Act."

The above act then provides that the election precincts, districts, wards, and voting places shall not be changed within three months before the election. It further provides that when the precincts, districts, wards and voting places are changed, the county governing body establishes the voting places. These voting places are the same for all elections whether primary, general, special, federal, state, district, county, or municipal. See also Act No. 141, First Special Session 1956, approved February 24, 1956, amending Title 17, Sections 77, 80, 81, 84 and 89, Code of Alabama 1940.

Whatever may have been the law before the passage of Act No. 655, supra, it is clear now that the county governing body establishes the voting places in municipalities as well as all other places in the county in all elections, except those where later laws have made other provisions. An example is the law providing for municipal bond elections. In these elections, the municipal governing body designates the number and location of voting places. Title 37, Section 279, Code of Alabama 1940, as amended by Act No. 851, General and Local Acts 1953, page 1143.

Since your request states that two voting places have heretofore been estabished in the town of Town Creek for county, general and special elections, I am of the opinion that these voting places must be used for the general municipal election to be held on September 17, 1956, in order to conform to the requirements of Act No. 655, supra.

Yours very truly,

JOHN PATTERSON
Attorney General

August 10, 1956

Hon. J. S. Frazer
Personnel Director
State of Alabama
CAPITOL

Merit System—Employees' Retirement System.

(1) The provision of Section 5, Act No. 515, General Acts 1945, page 734, as amended by Act No. 407, General and Local Acts of 1951, page 732, which provides "that a person who attains the age of seventy or above may be continued in the State's service, from year to year, on application of the employee approved by the Personnel Board," does not apply to employee of State in service

of State on June 1, 1945, who elected not to become a member of the Employees Retirement System.

(2) Under Title 55, Section 300, Code of Alabama 1940, the Personel Board has authority to prescribe reasonable rules, but said rules cannot subvert or enlarge upon the statutory law.

Opinion by Assistant Attorney General Baker.

Dear Sir:

Your request for an official opinion bearing date of June 8, 1956, is as follows:

"Your attention is called to Section 5 of Act No. 407 of the 1951 Legislature, approved August 15, 1951, which reads in part as follows:

"'(1) (c) Any member in service who has attained age seventy shall be retired forthwith; provided, that any member who is an official appointed for a term of years may remain in service until the end of the term of office for which he was appointed; and provided further, that a person who attains the age of seventy or above may be continued in the State's service, from year to year, on application of the employee approved by the Personnel Board, if evidence of physical and mental fitness is furnished. Nothing in this Act shall require the dismisal of any person seventy years old or over who fails to join the retirement system within the time specified in this Act, if such person was in the employ of the State on June 1, 1945.'

"Your opinion concerning the following questions is hereby requested:

"1. In the quoted section, does the provision 'that a person who attains the age of seventy or above may be continued in the State's service, from year to year, on application of the employee approved by the Personnel Board . . .' apply to employees who are not members of the retirement system, as well as to members?

"2. Does the Personnel Board have the authority to extend by rule the compulsory retirement provisions of this section and apply them to employees who are not members of the Retirement System?"

The questions here involved are the same questions involved in the case of **Morrison vs. Department of Highways, State of Louisiana,** 229 La. 116, 85 So. 2d 51. The constitutional provision in force in Louisiana at the time of the **Morrison** case, supra, reads "that he shall not be demoted, dismissed, or discriminated against, except for cause." Louisiana Constitution, Article XIV, Section 15 (N) (1). Title 42, Section 551, Louisiana Revised Statutes 1950, provides that all employees employed by the state subsequent to June 30, 1947, shall be members of the State Employees' Retirement System.

Title 42, Section 585, Louisiana Revised Statutes 1950, as amended, provides for compulsory retirement at the age of 70 of any employee who is a member of the retirement system. However, the governing statutes in Louisiana do not provide for compulsory retirement of those state employees who were in the employ of the state prior to June 30, 1947, and who had not elected to become members of the retirement system.

The Civil Service Commission of the State of Louisiana promulgated a rule which required the compulsory retirement of persons 70 years of age who had elected not to become members of the State Retirement System and who were in the employ of the state prior to June 30, 1947. Morrison was dismissed from the service of the Department of Highways; and, in reviewing his case, the Supreme Court of Louisaina held that the rule was in conflict with the constitutional provision heretofore set out, that age was not sufficient cause for dismissal, and ordered his reinstatement.

It is my opinion that the quoted section which reads, "that a person who attains the age of 70 or above may be continued in the state service from year to year, on application of the employee, approved by the Personnel Board," does not apply to employees who are not members of the State Retirement System. Your first question is, therefore, answered in the negative.

The State Personnel Board has authority to make rules which it deems necessary, appropriate and desirable to carry out the provisions of Title 55, Chapter 9 (Sections 293 through 327), Code of Alabama 1940, and amendments thereto. Valid rules adopted in accordance with Title 55, Section 300, Code of Alabama 1940 have the force and effect of law.

The Supreme Court of Alabama has held that administrative implementation cannot deviate from the principle and policy of a statute, and rules and regulations and administrative action cannot subvert or enlarge upon the statutory policy or rules and regulations therein set down. **Alabama State Board of Optometry et al vs. Busch Jewelry Company,** 261 Ala. 479, 75 So. 2d 121; **Hamm, Commissioner of Revenue vs. State er rel Martin, et al,** 250 Ala. 81, 33 So. 2d 358; **Marcet vs. Board of Plumbers Examination and Registration of Alabama, et al,** 249 Ala. 48, 29 So. 2d 333; **Murray vs. Service Transport, Inc.,** 254 Ala. 683, 49 So. 2d 221.

A rule as suggested in your letter would be in conflict with that part of Section 5 of Act No. 515, as amended, supra, providing that, "Nothing in this Act shall require the dismissal of any person seventy years old or over who fails to join the retirement system within the time specified in this Act, if such person was in the employ of the State on June 1, 1945."

It is my opinion that the Legislature of Alabama did not intend that persons in the employ of the State on June 1, 1945, who elected not to become members of the Employees' Retirement System would be placed in the same category as those who were employed subsequent to that date or those who had elected to come under the system. Your second question is, therefore, likewise answered in the negative.

Yours very truly,
JOHN PATTERSON
Attorney General

September 5, 1956

Hon. W. M. Gwin
Chairman, Board of Registrars
Jefferson County
Jefferson County Courthouse
Birmingham, Alabama

Veterans—Poll Tax and Poll List—Exemptions—Military and Naval Affairs.

Cadets of United States Army, Navy, and Air Force Academies are in the "military service" within the meaning of Section 194½, Constitution of Alabama 1901, as amended by Amendments XLIX and XC. Those who honorably served as such within the period from June 24, 1950, to January 31, 1955, would be exempt from the payment of poll tax thereunder.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of August 27, 1956, is as follows:

"A Midshipman at the United States Naval Academy, Annapolis, Maryland, who enlisted or registered for training at the Academy on June 29, 1953, has applied for registration as a voter in Jefferson County. He is 22 years of age, born May 23, 1934. He is now in his fourth year of training. We would like to have the following questions answered as soon as possible, so that we may advise him if he is qualified to vote in the November election.

"1. While in school as a Midshipman at the Naval Academy, is he exempt from poll tax?

"2. Does he have to have active duty in the United States Navy, after graduation, in order to claim exemption from poll tax?"

Section 194½, Constitution of Alabama 1901, as amended by Amendment No. XLIX, proclaimed ratified November 17, 1944, and Amendment No. XC, proclaimed ratified December 19, 1951, relates to the exemption from payment of poll tax of certain persons who have served in the military service of the United States.

Amendment No. XC, supra, the last constitutional section ratified, reads as follows:

"No person who honorably served in the military service of the United States between January 1, 1917 and November 11, 1918, or between September 16, 1940 and December 8, 1941, or at any time past, present or future, when the United States was, is or shall be engaged in hostilities, whether as a result of the declared war or not, with any foreign state shall be required after the beginning of such service to pay the poll tax specified in the constitution of Alabama as a prerequisite to the privilege of voting in Alabama; but, on the contrary, every such person shall be exempt from the payment of all poll taxes which have theretofore accrued and have not been paid or which may thereafter accrue; provided, however, that if any such person is discharged dishonorably from service the exemption herein provided is forfeited, and such dishonorably discharged person, as a prerequisite to the privilege of voting in Alabama thereafter, must pay the poll tax specified in the constitution of Alabama as if such person had never been in service. The term 'military service' as used herein includes service in the United States army, the United States navy, the United States air forces, the marine corps, the coast guard, or any reserve or auxiliary complement of any of said services. The judge of probate shall issue a certificate of exemption to a person exempt from the payment of poll tax by reason of this amendment under such rules and regulations as may be prescribed by the governor. This amendment shall be self-executing and retroactive; but the legislature is authorized to enact laws designed to carry out the purpose of this amendment."

Your attention is first directed to the first portion of this constitutional amendment which in effect exempts from payment of poll tax those persons (with qualifications therin and thereafter outlined) who served in the military service of the United States, while the United States was engaged in hostilities with any foreign state. Obviously, this relates to veterans of World War I and World War II. The amendment also extends this exemption of poll tax payment to similarily qualified persons serving in the military service of the United States "at any time past, present or future" when the United States, at the time of such service, was engaged in or engages in hostilities with any foreign state. Likewise obvious, is that this is directed to persons serving during the Korean conflict and future wars or conflicts.

Thus, for purposes of framing an answer to your questions, the first consideration is whether or not the person to whom you refer served during a period of time when the United States was engaged in hostilities with a foreign state.

From the facts, you state that said person was born on May 23, 1934. Such person, therefore, became 21 years of age on May 23, 1955. You also state that said person is in "his fourth year of training" at the United States Naval Academy as a midshipman. The assumption is, therefore, that such person was enrolled as a midshipman at the United States Naval Academy after June 24, 1950, and prior to January 31, 1955.

This ofice, in an official opinion reported in Quarterly Report of Attorney General, Vol. 78, page 42, held that the Korean conflict, for purposes of establishing exemptions of veterans from poll tax under Section 194½, as amended, supra, commenced on June 24, 1950, and ended January 31, 1955.

Therefore, the person to whom you refer would have served during a period of time that would be within the purview of Section 194½, as amended, supra, i. e., after June 24, 1950, and prior to January 31, 1955.

The next consideration is whether or not a midshipman of the United States Naval Academy serves in the military service of the United States within the meaning of the constitutional section and amendments referred to. In the latter portion of Amendment No. XC, supra, it is observed that "the term 'military service' as used herein includes service in the United States army, **the United States navy,** the United States air forces, the marine corps, the coast guard, **or any reserve or auxiliary complement of any said services.**" (Emphasis supplied.)

In 6 C. J. S., Military and Naval Academies and Cadets, Section 11, at page 352, it is stated in pertinent part as follows:

> "The professors and the corps of cadets of the United States military academy at West Point are by the act of February 2, 1901, and subsequent acts, declared to be a part of the army of the United States; and the professors and cadets of the naval academy at Annapolis are under the jurisdiction of the secretary of the navy and constitute a part of the navy . . . ." (Citing **U. S. v. Perkins,** 6 S. Ct. 449, 116 U. S. 483, 29 Law Ed. 700, affirming 20 Ct. Cl. 438; 5 C. J. page 308, Note 15.)

This authority, coupled with the express wording of Section 194½, as amended, supra, to the effect that the meaning of the term "military service" as used therein includes the United States navy or "any reserve or auxiliary complement" thereof, leads me to the conclusion that it was intended that Section 194½, as amended, supra, include midshipmen serving at the United States Naval Academy.

Premises considered, it is my opinion that the person to whom you refer has no poll tax due and is exempt from all payment of poll taxes in view of Section 194½, as amended, supra. Your first question is, therefore, specifically answered in the affirmative.

The foregoing is equally applicable to cadets of the U. S. Military Academies of the Army and Air Force.

The answer to your first question and the explanation hereinabove made make it unnecessary to answer your question number two.

Yours very truly,

JOHN PATTERSON
Attorney General

September 6, 1956

Hon. Clyde C. Cargile
Judge of Probate
Fayette County
Fayette, Alabama

Licenses—Vending Machines—Tobacco.

1. Under Title 51, Section 613, Code of Alabama 1940, as last amended by Act No. 688, General Acts 1947, page 522, the vending machine license tax is levied on the operator of the vending machine.

2. Where the operator of the vending machine is a different person or entity from the operator of the store or establishment in which the vending machine is operated, then such operator of the machine is liable for the license under Section 613, as amended, supra, or at his election, a license (if there be one) for selling the specific commodity vended by the machine, notwithstanding the fact that the owner or operator of the store or other place of business already has a license to sell such specific commodity.

3. Under no circumstances can the owner or operator of a store sell tobacco products over the counter of a store without paying the retail tobacco dealer's license tax levied under Title 51, Section 484, Code of Alabama 1940. This would apply regardless of whether or not there were licensed cigarette vending machines operated in the store, either by the storekeeper or by someone else.

4. The operator of several machines vending cigarettes could not lawfully place them in other persons' stores or places of business by purchasing only one retail tobacco dealer's license. Under such circumstances and the provisions of Section 613, as amended, supra, and Title 51, Section 831(a), Code of Alabama 1940, as last amended by Act No. 700, General and Local Acts 1951, page 1207, each such vending machine would constitute a separate place of business, and each such machine would require either a vending machine license under Section 613, as amended, supra, or a retail tobacco dealer's license under Section 484, supra.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of June 1, 1956, is as follows:

"In the purchase of a vending machine license, Section 613, Title 51, Code of Alabama, the following answers are desired:

"A person owning a place of business and purchasing a Retail Tobacco License, may operate a vending machine under this same License. Does this entitle another person who owns a vending machine to operate under cover of the owner's License? (In the same place of business)

"If a person owns a vending machine and pays a vending machine license and places the machine in another persons place of business, may the owner of the place of business sell tobacco products other than those in the vending machine under cover of the Vending machine owners license?

"May the owner of vending machines place them about in various places of business selling Tobacco, on a Retail Tobacco License, or must he have the regular Vending machine License?"

Before attempting to answer your specific questions, it is well for us to first consider the nature of the vending machine license tax and the first two provisos contained in the statute, as last amended.

This license tax is levied under the provisions of Title 51, Section 613, Code of Alabama 1940, as last amended by Act No. 688, General Acts 1947, page 522. The statute very clearly provides that the license tax levied therein shall be "**upon the operator of the machine.**" The operator of the machine being the taxpayer, it is necessary to ascertain who is the operator in each case in order to properly collect the tax. Where a vending machine is operated by any person in another person's store, or other commercial establishment, or place accessible to the public, or other establishment not expressly exempt or otherwise specifically provided for in Section 613, as amended, supra, under a lease or other agreement or arrangement, then this has been held to be nothing more than the owner or operator of such store or other establishment renting space therein to the operator of the vending machine. Thus, when the operator of the vending machine is not the same person as the owner or operator of the store or other establishment in which the vending machine is located, the space utilized by the vending machine has been said to be a separate and distinct place of business from the store in which the vending machine or machines are located. **State v. Woods,** 242 Ala. 184, 5 So. 2d 732; Quarterly Report of Attorney General, Vol. 50, page 45.

It is true that under the second proviso contained in Section 613, as last amended, supra, the operator of the machine has an election to purchase the vending machine license under Section 613, as amended, supra, or the specific license (such as the retail tobacco dealer's license under Title 51, Section 484, Code of Alabama 1940) for the privilege of selling the specific commodity being vended by the machine. This, however, would appear to mean, if construed pari materia with other pertinent provisions of the license tax laws of this State, and, in particular, in light of Title 51, Section 831 (a), Code of Alabama 1940, as last amended by Act No. 700, General and Local Acts 1951, page 1207, that the operator of the machine or machines, as the case may

be, has the election of either purchasing the vending machine license under Section 613, as amended, supra, for each machine operated in such place of business, or privilege license, (if there be one) covering the sale of the specific commodity involved, as to each machine.

In this connection, subsection (a) of Section 831, as amended, supra, reads as follows:

> "Whenever a license is levied in this title, **there shall be collected** both a state and county license **for each place of business,** except as specifically otherwise provided." (Emphasis added.)

Moreover, the proviso relating to the operation of vending machines in stores or other public places does not contain any specific provisions which would take it out of the operation of said subsection (a) of Section 831, as amended, supra. To the contrary, this proviso appears, by the language used therein, to be confined to the "place of business" where the vending machine is located. It is said to apply where a privilege license has been secured by the operator of the machine for the sale of the specific commodity which is vended by the machine at that particular place of business. Quarterly Report of Attorney General, Vol. 19, page 136; Quarterly Report of Attorney General, Vol. 50. page 45.

Read with the provisions of subsection (a) of Section 831, as amended, supra, this proviso clearly indicates that Legislature intended that the operator of the machine who was not the owner or operator of the store or other place of business in which the machine is located, either purchase a vending machine license for each machine operated or a privilege license covering the sale of the specific commodity, such as the retail tobacco dealer's license in this case, as to each space rented and occupied by such vending machine. Each such space is considered to be a separate "place of business."

While a vending machine has been held not to be a "store," it has been very clearly held to be a "place of business," and one separate and distinct from the store in which it is located, where the storekeeper or owner of the establishment is not the same person as the operator of the vending machine. Quarterly Report of Attorney General, Vol. 55, page 29; Quarterly Report of Attorney General, Vol. 13, page 16; **State v. Woods,** supra.

In **State v. Woods,** supra, the Supreme Court of Alabama held, in material part, as follows:

> ". . . We may observe, as a matter of common knowledge, that many places of business rent space in their establishments to third persons who may and do conduct their own and different businesses in such space or department so rented. **Such space or department becomes, and is, a separate place of business,—the business of such third party. If, therefore, a vending machine owner rents (method or payment immaterial) space for a vending machine and such space becomes his place of business**

(special or limited), in the conduct of his business he thereby makes himself . . . liable for the tax . . . within the terms of the . . . vending machine statute in question." (Emphasis added.)

Our Supreme Court seems to have very clearly stated that each allotment of space is considered to be a separate and distinct place of business (special or limited), where the operator of the machine or machines is not the same as the owner or operator of the store or place of business in which the machine or machines are located.

The test for determining whether a certain place is a separate place of business has been held by our Supreme Court to be whether there is a "unity of management, ownership, and locality." **Johnson v. State,** 152 Ala. 61, 44 So. 555; **Anniston Electric & Gas Company v. State,** 12 Ala. App. 624, 67 So. 843; **State v. Woods,** supra.

Where the operator of the machine is not also the owner or operator of the store or other place of business where the machine or machines are located, such owner or operator is said to be renting a separate and distinct allotment of space for each vending machine which, according to these decisions and the test applied, constitutes a separate and distinct place of business in each instance. In other words, there would not be a "unity of . . . locality," for each vending machine would occupy a separate and distinct allocation of space.

It is, therefore, my opnion that, in the case of vending machines being operated in a store or other place of business, and where the operator of the machines is not also the owner or operator of the store or other establishment, the operator of the vending machine or machines would be liable either for a vending machine license under Section 613, as amended, supra, or a license for the privilege of selling the specific commodity vended by the machine (the retail tobacco dealer's license under Section 484, supra, in this case) as to each of the vending machines operated by him in the store. If there is no specific license provided for the privilege of selling the specific commodity vended by the machine, then, of course, the operator would have no such election but would be liable for the vending machine license under Section 613, as amended. supra, as to each of the machines operated.

In conclusion, it might be well to state that some question has been raised as to the first presumption contained in Section 613, as amended, supra, which is as follows:

". . . provided, however, that in the event any unlicensed machine, coin-operated radio, transmitter or speaker is found in any establishment or place of business, the operator of such establishment or place of business **shall be conclusively presumed to be the operator of such machine** . . . and shall be liable for the license therefor." (Emphasis added.)

Under this proviso the argument has been advanced that if an unlicensed machine is found in a store or other place of business, the presumption would be a conclusive one that the operator of such a store or place of business was also the operator of the vending machine or machines involved, regardless of what proof could be offered to the contrary as to who is the actual operator of the vending machine or machines.

This assumption appears to be an erroneous one. In the first place, if said proviso is so construed, then it would be of very questionable validity.

> "A conclusive presumption, or a presumption that operates to deny a fair opportunity to repel it, violates the due process clause (of the Federal and State Constitutions). Even a statute that hurts the evidence that may be offered in rebuttal of the presumption is invalid. . . ."

12 Am. Jur., Constitutional Law, Section 625, page 317; 51 A. L. R. 1149.

The above rule has been said to be especially applicable to penal statutes and to tax matters. 12 Am. Jur., Constitutional Law, Sections 628 and 629, page 320.

The presumption is evidence only and has its controlling effect as such until overcome by other evidence. **Freeman v. Blount,** 172 Ala. 655, 55 So. 293; **Zeigler v. South & North Ala. R. R. Co.,** 58 Ala. 594; **Burk v. State,** 216 Ala. 655, 114 So. 72; **Williams v. Wilson,** 210 Ala. 289, 97 So. 911; **Home Insurance Co. of New York v. Murphy,** 223 Ala. 566, 137 So. 393:

No presumption can stand in the face of facts. Wigmore on Evidence, Second Edition, Section 2491; 66 A. L. R. 106; **Griggs v. State;** 37 Ala. App. 605, 73 So. 2d 382.

The foregoing rules would seem to be especially applicable to Section 613, as amended, supra, and this particular proviso contained therein, as Section 613 is penal in nature in that under Title 51, Section 834, Code of Alabama 1940 (applicable to all privilege and occupational licenses), it is made a misdemeanor, subject to the penalties prescribed therein, to operate a vending machine without first having obtained a license. This is in addition to the civil remedies prescribed for the enforcement of such license tax. It is, therefore, my opinion that the presumption under consideration could not be construed to be a conclusive one where evidence and proof can be introduced, and is introduced, by either the tax payer or the State as to who is the actual operator of the vending machine in such cases.

This construction also would appear to be in conformity with the rule that a statute, where at all possible, is to be construed in such a way as to give it validity. **Henry v. McCormick Bros. Motor Co.,** 232 Ala. 196, 167 So. 256; **Johnson v. State,** 245 Ala. 499, 17 So. 2d 662; 4 Ala. Dig., Constitutional Law, Key No. 48.

The foregoing being considered, your specific inquiries are answered as follows:

1. The answer to your first question is in the negative. If the actual operator of the vending machine is a different person or separate entity from the person who operates the store, then he would have to purchase a proper license for operating the vending machine regardless of the fact that the operator of the store had a retail tobacco dealer's license. The operator of the vending machine or machines under such circumstances can purchase either the vending machine license or the retail tobacco dealer's license for each machine he operates in the store.

2. The answer to your second question is in the negative. The operation of the store and the operation of the vending machine are two distinct operations. Irrespective of this, the owner or operator of the store could not sell tobacco products over the counter of the store without having the retail tobacco dealer's license, even though he sells cigarettes through a vending machine or machines which he operates himself and for which he has procured the vending machine license.

3. The answer to your third question is also in the negative. The owner or operator of several vending machines could not lawfully place them in another person's store or place of business by purchasing only one retail tobacco dealer's license, for under the circumstances and the provisions of Section 613 as amended, supra, and Section 831 (a), as amended, supra, when read together, each such vending machine constitutes a separate place of business and requires a proper license accordingly.

Yours very truly,

JOHN PATTERSON
Attorney General

September 6, 1956

Hon. W. L. Horn
Commissioner of Revenue
Department of Revenue
CAPITOL.

Taxation — Assessments — Boards of Equalization — Revenue, Department of.

1. Under the provisions of Title 51, Section 94, Code of Alabama 1940, as last amended by Act No. 218, General and Local Acts 1953, page 284, the Department of Revenue determines the exact number of working days necessary for boards of equalization (Jeffer-

son, Mobile and Montgomery Counties excepted) to properly perform their duties within the maximum number of days therein authorized. Said department, under this section, does not have authority to specify exact times and dates of the meetings of said boards.

2. Boards of equalization (Jefferson, Mobile and Montgomery Counties excepted) shall meet beginning the second Monday in March of each year, and at such other times as may be authorized by law, under the provisions of Title 51, Section 104, Code of Alabama 1940, as amended by Act No. 462, General Acts 1945, page 693. Said boards shall also meet on the first Monday in June of each year and continue in session as long as may be necessary, provided such sitting shall not extend beyond the second Monday in July, unless otherwise authorized by the Department of Revenue, under the provisions of Title 51, Section 106, Code of Alabama 1940, as amended by Act No. 462, General Acts 1945, page 693, and Title 51, Section 107, Code of Alabama 1940.

3. The supervisory and directory powers given the Department of Revenue under Title 51, Section 131, Code of Alabama 1940, do not authorize the abrogation or amendment of existing statutes providing for specified meetings of boards of equalization. Meetings at times and dates other than those provided by statute are not authorized.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of August 21, 1956, is as follows:

"Section 94, Title 51, Code of Alabama 1940, prior to its being amended, provided that Boards of Equalization would serve during the months of March, April, June and July of each year and such other times as the members of the County Boards of Review had theretofore been required to serve. This Section of the statute was amended by Act No. 218, General Acts 1953, page 284 and the amended Act authorizes the Department of Revenue to fix the exact working period in which the Boards of Equalization shall work or serve.

"Section 104, Title 51, Code of Alabama 1940, prior to its being amended, provided that the Equalization Boards should meet on the second Monday in March and sit at the courthouse of the county from day to day until their duties were completed, which should not be later than the first Monday in April; and that the Board should review, revise, correct and fix the assessment values, etc. This Section was amended by General Acts

1945, page 697 and provides that the Equalization Boards shall meet on the second Monday in March, or at such other time as may be authorized by law and sit at the courthouse from day to day, reviewing, revising, correcting and fixing the assessment values made by the tax assessor, until their duties are completed or until their allotted number of days shall have become exhausted, etc.

"Will you please officially advise me if members of the Boards of Equalization (Jefferson, Mobile and Montgomery Counties excepted) must serve their alloted number of days beginning the second Monday in March, or, may the Commissioner of Revenue, pursuant to authority granted in Section 131, Title 51, Code of Alabama 1940 authorize the members to serve at any time during the calendar year, so long as their allotted number of days are not exceeded."

In answer to your inquiry, it is my opinion that members of the boards of equalization (Jefferson, Mobile and Montgomery Counties excepted) must serve their allotted number of days beginning the second Monday in March of each year.

Before considering the effect of the broad supervisory and directory powers of the Department of Revenue (Commissioner of Revenue), pursuant to Title 51, Section 131, Code of Alabama 1940, it is necessary to determine the times and dates of the meetings of the boards of equalization (Jefferson, Mobile and Montgomery Counties excepted) as provided for in existing statutes.

Title 51, Section 94, Code of Alabama 1940, as last amended by Act No. 218, General and Local Acts 1953, page 284, provides for the annual term of service and compensation of members of the several county boards of equalization on the basis of the total assessed value of all taxable property in the respective counties affected, using the year 1951 as a basis. The maximum number of working days authorized for the various boards respectively is based on an assessed value of not less than a certain amount of dollars and not more than a certain amount of dollars. Insofar as your inquiry is concerned, in each of the brackets set forth in the statute following the maximum number of working days authorized, the following appears: "The exact working period to be fixed or approved by the Department of Revenue." This proviso, in my judgment, merely means that the Department of Revenue should determine the exact number of working days necessary for the respective boards of equalization to properly perform their duties within the maximum number of days authorized. It does not mean that said department under this section has the authority to specify the exact times and dates of the meetings of said boards.

Title 51, Section 104, Code of Alabama 1940, as amended by Act No. 462, General Acts 1945, page 693, at page 697, provides as follows:

"Section 104. Meetings to review asessments; majority to govern.—When the assessor shall have completed the assessment, valuation and equaliza-

tion work in his county, as provided by law, he shall notify each member of the board of equalization, if such board is not required by law to serve full time, **and such board shall meet on the second Monday in March, or at such other time as may be authorized by law, and sit at the court house of the county, from day to day, until their duties are completed or their allotted number of days exhausted, and shall review, revise, correct and fix the assessment values made by the tax assessor** by raising or lowering the assessment of any person, partnership, corporation or association, except such assessments as have been approved by the department of revenue, as to any or all of the items of his assessment, in such manner as to secure the assessment of property at sixty (60) percent of its fair and reasonable market value. The majority of the board of equalization shall govern in fixing the value for assessment of all property before them for determination." (Emphasis supplied.)

Under the above, boards of equalization shall meet beginning on the second Monday in March for the purposes shown in the emphasized portion of the above quoted section. This is in accordance with Title 51, Section 57, Code of Alabama 1940, which deals with the duties of the tax assessor and provides that he deliver his completed assessment lists to the boards of equalization not later than the second Monday in March.

This office has heretofore held that Section 94, supra, before amendment, and Section 104, supra, before amendment, both had a field of operation — Quarterly Report of Attorney General, Vol. 18, page 303. This is still true as to both of these sections as last amended.

Under the provisions of Title 51, Section 106, Code of Alabama 1940, as amended by Act No. 462, General Acts 1945, page 693, and Title 51, Section 107, Code of Alabama 1940, boards of equalization meet for the purpose of hearing objections to assessments of valuation on the first Monday in June and continue in session as long as may be necessary, provided such sitting shall not be extended beyond the socond Monday in July, unless otherwise ordered by the Department of Revenue. Said boards are without statutory authority to meet prior to this time for this particular purpose.—Quarterly Report of Attorney General, Vol. 55, page 36.

The above are the specific statutory provisions regarding the meetings of the boards of equalization (Jefferson, Mobile and Montgomery Counties excepted) under the presently existing statutes. The query now presents itself as to whether the Department of Revenue (Commissioner of Revenue), under the provisions of Title 51, Section 131, Code of Alabama 1940, supra, has the authority to enlarge upon or diminish the statutory times and dates at which boards of equalization may meet. In my opinion, this query should be answered in the negative.

The supervisory and directory powers given the Department of Revenue (Commissioner of Revenue) under Section 131, supra, do not, in my opinion, authorize the abrogation or amendment of existing statutory provisions. If a certain matter is definitely provided for by statute, the statutory provisions

must govern. The authority granted under Section 131, supra, in my judgment, is for the purpose of supplementing existing statutes wherein certain specific provisions relative to the administration and enforcement of the tax laws of the State are lacking.—See opinion of the Attorney General to the Personnel Director, dated August 10, 1956 (Ms.), and authorities cited therein.

It follows, therefore, since there are definite statutory provisions relative to the times and dates of the meetings of the boards of equalization (Jefferson, Mobile and Montgomery Counties excepted), the Department of Revenue (Commissioner of Revenue) has no authority to alter or change said provisions. No supplementation is necessary under the board supervisory and directory powers granted therein.

The first meeting of the boards of equalization (Jefferson, Mobile and Montgomery Counties excepted) is provided for by statute to be the second Monday in March. There would be no occasion for said boards to meet prior to this time as they would have no duties to perform. Their work begins when the returns of the tax assessor are delivered to the boards of equalization not later than the second Monday in March. The tax assessor would be under no duty to deliver said returns to the boards prior to that time.

Yours very truly,

JOHN PATTERSON
Attorney General

September 13, 1956

Hon. Price M. Bryant
Tax Collector
Morgan County
Decatur, Alabama

Municipalities — Taxation — Tax Assessors — Tax Collectors — Opinions Overruled, Modified and Distinguished.

1. The levy of municipal ad valorem taxes by ordinance imposes such tax on all property located in the municipality on the first day of October succeeding the enactment of such ordinance, including that property which is annexed to such municipality after the ordinance is enacted.

2. The opinion reported in Quarterly Report of Attorney General, Vol. 33, page 26, is overruled.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of September 6, 1956, is as follows:

"On September 4, 1956 the town of Austinville voted to incorporate with the City of Decatur, Alabama in Morgan County, Alabama.

"The tax rate for the Town of Austinville is 12½ mills. The tax rate for the City of Decatur is 15½ mills—assessments have been made and receipts are complete for the tax year 1956 accordingly.

"This office collects tax for both Austinville and Decatur on salary paid by the County Board of Revenue.

"Shall this office proceed to collect 1956 taxes from Austinville property owners, as it is now set up, or shall we change the tax rate for 1956 to comply with the Decatur rate?

"In case a change is ruled, what shall be the procedure?

"An early ruling will be appreciated."

Pursuant to Title 37, Section 188, Code of Alabama 1940, as amended by Act No. 642, General Acts 1947, page 495, the town of Austinville was annexed to and became a part of the city of Decatur upon the canvass of returns of the election held on September 4, 1956.

By virtue of Title 37, Section 700, Code of Alabama 1940, the municipalities of this state, with certain exceptions not here pertinent, are authorized to levy a tax on property situated in such municipalities, based on the value of such property as assessed for state taxation as shown by the books of assessment for the state and county tax year ending the 30th day of September, next succeeding the levy. See Constitution of Alabama 1901, Section 216, and Amendment No. LVI to the Constitution of Alabama 1901. Cf. **City of Montgomery vs. Graham, et al,** 255 Ala. 685, 53 So. 2d 363.

The ad valorem taxes of these municipalities are payable in advance. Said taxes become due and payable on the first day of October of each year, the law day for the levy of such taxes, at the time state and county taxes for the preceding year are due and payable. **Johnson vs. State, ex rel. City of Birmingham,** 245 Ala. 499, 17 So. 2d 662; Quarterly Reports of Attorney General, Vol. 76, page 58, and Vol. 80, page 12.

Premises considered, I am of the opinion that, since the territory which is the subject of your inquiry will be a part of the city of Decatur on October 1, 1956, ad valorem taxes due on said date should be assessed and collected on all property located in said territory at the rate heretofore fixed by ordi-

nance by the city of Decatur. Your tax assessor's books of the assessment, which he is required to prepare by Title 37, Section 706, Code of Alabama 1940, should now be corrected to show the amount due on October 1, 1956, as ad valorem taxes for the city of Decatur on the property located in said territory, so that you may collect the proper amount due as such taxes on said property as provided by Title 37, Section 701, Code of Alabama 1940. **Johnson vs. State, ex rel. City of Birmingham,** supra.

The opinion reported in Quarterly Report of Attorney General, Vol. 33, page 26, is hereby overruled.

Yours very truly,

JOHN PATTERSON
Attorney General

September 14, 1956

Hon. H. J. Brogden
Judge of Probate
Covington County
Andalusia, Alabama

Veterans — Poll Tax and Poll List — Exemptions — Military and Naval Affairs — Opinions Overruled, Modified or Distinquished.

1. Those persons honorably serving in the military service of the United States between January 1, 1917, and November 11, 1918, between September 16, 1940, and January 31, 1955, and at any time in the past or future when the United States was or shall be at war or engaged in hostilities with any foreign state, are entitled to poll tax exemption under Section 194½, Constitution of Alabama 1901, as amended by Amendment XLIX and XC.

2. All other opinions in conflict expressly overruled, specifically that opinion reported in Quarterly Report of Attorney General, Vol. 50, page 14.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of September 7, 1956, is as follows:

"Some time back we had an opinion from the Attorney General's Office to the effect that any person who went into service between Sept. 2, 1945 and June 24. 1950 were not entitled to credit for poll tax.

"Will thank you to advise me if that is the law at this time, as we are having to make explanations daily as to why we cannot give them credit for poll tax, and I didn't know unless the conditions on which that opinion was based had been changed."

Section 194½, Constitution of Alabama 1901, as amended by Amendment No. XLIX, proclaimed ratified November 17, 1944, and Amendment No. XC, proclaimed ratified December 19, 1951, relates to the exemption from payment of poll tax of certain persons who have served in the military service of the United States.

Amendment No. XLIX, supra, reads as follows:

"No person who honorably served in the military service of the United States between January 1, 1917 and November 11, 1918, or between September 16, 1940 and December 8, 1941, **or at any time, past or present or future, when the United States was, is or shall be at war with any foreign state,** shall be required after the beginning of such service to pay the poll tax specified in the Constitution of Alabama as a prerequisite to the privilege of voting in Alabama; but, on the contrary, every such person shall be exempt from the payment of all poll taxes which have therefore accrued and have not been paid or which may thereafter accrue; provided, however, that if any such person is discharged dishonorably from said service the exemption herein provided is forfeited, and such dishonorably discharged person, as a prerequisite to the privilege of voting in Alabama thereafter, must pay the poll tax specified in the Constitution of Alabama as if such person had never been in such service. The term 'military service' as used in this section includes service in the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, the Women's Army Auxiliary Corps, the Women's Appointed Volunteer Emergency Service, and the Women's Reserve of the United States Navy. The United States shall not be deemed at war with a foreign state within the meaning of this section at a time when an armistice exists between the United States and the foreign state. The Judge of Probate shall issue a certificate of exemption to a person exempt from the payment of poll tax by reason of this section under such rules and regulations as may be prescribed by the Governor. This section shall be self-executing and retroactive; but the Legislature is authorized to enact laws designed to carry out the purposes of this section." (Emphasis supplied.)

The first portion of this constitutional amendment refers to a period of military service between January 1, 1917, and November 11. 1918. This obviously refers to military service during World War I. The second reference to a period of military service is between September 16, 1940, and December 8, 1941. This likewise obviously refers to military service from the time the draft

just prior to World War II was initiated until the commencement of World War II. The amendment then refers to those persons who honorably served in the military service of the United States "at any time, past or present or future" when the United States, at the time of such service, was, is or shall be "at war" with any foreign state. This latter reference clearly was directed to veterans who had honorably served or would honorably serve from the commencement of World War II to its conclusion and any like period of service in the future when the United States is at war.

World War II, insofar as the United States is concerned, commenced on December 7, 1941. It officially came to a conclusion on October 19, 1951. In this regard your attention is directed to the case of **State v. Gibson,** 258 Ala. 512, 64 So. 2d 75, wherein the Supreme Court of Alabama held in part as follows:

> ". . . though the actual hostilities between this country and our enemies ceased in 1945, we were still at war. Our armies, navies, and air forces, exercising our war power, were still abroad and no peace terms had been made with our enemies. This status prevailed with respect to Japan until the treaty of peace was signed September 8, 1951, and with respect to Germany until peace was proclaimed by the President after a joint resolution passed by Congress October 19, 1951."

Thus, under Amendment No. XLIX, supra, and **State v. Gibson,** supra, persons who honorably served in the military service of the United States between January 1, 1917, and November 11, 1918, between September 16, 1940, and October 19, 1951, and any time in the past or future that the United States was or is "at war," are entitled to veterans' poll tax exemption.

Amendment No. XC, supra, in pertinent part, reads as follows:

> "No person who honorably served in the military service of the United States between January 1, 1917 and November 11, 1918, or between September 16, 1940 and December 8, 1941, **or at any time past, present or future, when the United States was, is or shall be engaged in hostilities, whether as a result of a declared war or not, with any foreign state** shall be required after the beginning of such service to pay poll tax specified in the constitution of Alabama as a prerequisite to the privilege of voting in Alabama; . . ." (Emphasis supplied.)

Amendment No. XC did not supplant or replace Amendment No. XLIX and must, therefore, be considered as a separate constitutional amendment which has, in effect, simply extended the coverage of persons honorably serving in the military service of the United States when the United States was, is or shall be "at war" with a foreign state to such persons serving when the United States was, is or shall be "engaged in hostilities, whether as a result of a declared war or not," with a foreign state. This clearly is directed to military service during the Korean conflict, wherein no official declaration of war existed, and any similar type military service in the future.

This office, in an official opinion reported in Quarterly Report of Attorney General, Vol. 78, page 42, held that the Korean conflict, for purposes of establishing exemptions of veterans from poll tax under Section 194½, as amended, supra, commenced on June 24, 1950, and ended January 31, 1955.

Thus, it can be seen that there is an overlap between the date that the Korean conflict has been determined to have officially commenced (June 24, 1950) and the date that World War II was officialy concluded (October 19, 1951). Therefore, the exemption period has been determined to be a continuous one from the inception of the draft just prior to the commencement of World War II (September 16, 1940) to the conclusion of the Korean conflict (January 31, 1955).

Premises considered, the following persons, who honorably served in the military service of the United States, are, in my opinion, entitled to veterans' poll tax exemptions:

1. Those serving between January 1, 1917, and November 11, 1918.

2. Those serving between September 16, 1940, and January 31, 1955.

3. Those serving at any time in the past or future when the United States was, or shall be, at war or engaged in hostilities with any foreign state.

Specifically, answering your question, it can be seen that a person, otherwise qualified, is entitled to poll tax exemption if he honorably served in the military service of the United States between September 2, 1945, and June 24, 1950, and you are so advised.

This opinion expressly overrules all other opinions in conflict herewith and specifically that opinion reported in Quarterly Report of Attorney General, Vol. 50, page 14.

Yours very truly,

JOHN PATTERSON

Attorney General

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